

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2012

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Complainant: John Kirkhope
Address: 33 Clarence Road North
Weston-super-Mare
BS23 4AW

Decision (including any steps ordered)

1. The complainant requested copies of guidance or criteria in relation to obtaining the consent of The Crown and The Duchy of Cornwall before bills are passed into law.
2. The Commissioner's decision is the withheld information is not exempt on the basis of the exemption at section 42(1) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in the pamphlet dated 15 November 2010 within the scope of the request of 24 August 2011. The information outside of the scope of the request can be found in specific parts of the pamphlet identified at paragraphs 12 and 14 below.
 - Disclose the pamphlet dated 1 August 2008 in compliance with the request of 27 September 2011.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant wrote to the public authority in August and September 2011 and requested information in the following terms:

24 August 2011

'.....I am also aware of the fact that the Duchy [of Cornwall] need only be consulted when its "hereditary revenues, personal property of the Duke or other interests" are affected. However, those terms are very general and there must be specific criteria and guidance which expands on those terms and provides guidance to those responsible for Bills. In particular, since arguably the revenues of the Duchy of Cornwall are part of the hereditary revenues of the Crown, I would be grateful if you would explain or provide information with regard to those hereditary revenues specific to the Duchy.'

27 September 2011

'.....the current internal guidance that you have relating [to] Crown application on legislation.....May I emphasise that I am seeking details of the application of Crown immunity as they apply to the Duchy of Cornwall...'

6. On 19 September 2011 the public authority responded to the request of 24 August 2011. It referred the complainant to its publicly available guide to making legislation¹ which in its view contained information relevant to the request. The public authority however explained that the internal guidance within the scope of his request was exempt from disclosure on the basis of section 42(1) of FOIA. On 25 October 2011 the public authority responded to the request of 27 September 2011. It informed the complainant that the information within the scope of the request was exempt from disclosure on the basis of section 42(1) of FOIA.
7. Following an internal review of its responses to both requests, the public authority wrote to the complainant on 16 November 2011. It upheld the application of the exemption at section 42(1) to all the information within the scope of both requests of 24 August and 27 September 2011.

¹ www.cabinetoffice.gov.uk/resource-library/guide-making-legislation

Scope of the case

8. On 18 November 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The complainant emphasised that he was not seeking information regarding correspondence with the Royal Household. He was instead seeking copies of manuals or internal materials which provide general guidance to the Cabinet Office and others on the application of laws specifically with regard to the Duchy of Cornwall. He submitted that it was clearly in the public interest that citizens understand how laws are made and applied as well as the circumstances in which the Duchy of Cornwall is consulted.
10. On the basis of the complainant's representations about the focus of his request, the Commissioner considers that he is seeking information specifically about obtaining Prince's consent to legislation only when it relates to the Duchy of Cornwall.

Reasons for decision

Section 42(1)

11. Section 42(1) of FOIA reads:

'Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.'

12. The public authority provided the Commissioner with copies of two internal pamphlets constituting the disputed information. For the request of 24 August, it provided an internal pamphlet dated 15 November 2010 and explained that although this pamphlet had been updated in December 2011, the November 2010 version was current at the time of the request. The pamphlet for the request of 27 September is dated 1 August 2008.

Request of 24 August 2011

13. The public authority informed the Commissioner that it did not consider all of the information in the pamphlet of 15 November 2010 fell within the scope of the request of 24 August. It submitted that information in the following paragraphs was outside the scope of the request: Paragraphs 5, 7 to 12, 17 to 21, 22 to 25, 27 to 30, 46 to 54, 57 to 59, 81 to 146 and the Appendix, save for paragraphs 3 to 7, 16, 21, 22 and 33 to 35.

14. Having reviewed the information in the paragraphs referred to above, the Commissioner finds that it is outside the scope of the request of 24 August 2011 as it does not specifically relate to obtaining The Duchy of Cornwall's consent to a bill.
15. The public authority further identified in the following paragraphs information on which it could not provide a definitive view as to whether this fell within the scope of the request of 24 August 2011: Paragraphs 13 to 16 and 62 to 80. For reasons set out in the confidential annex to this decision notice, to be disclosed to the public authority only, the Commissioner finds that the information in these paragraphs is outside the scope of the request of 24 August. To address this point in the main body of the notice would reveal disputed information and consequently defeat the purpose of withholding the information in the first place.

Application of section 42(1) to information within the scope of the request of 24 August 2011

16. The Commissioner next considered whether the remainder of the information in the pamphlet dated 15 November 2010 was exempt from disclosure on the basis of section 42(1).
17. The Commissioner adopts the description of legal professional privilege (LPP) as set out by the Information Tribunal (the Tribunal) in *Bellamy v The Information Commissioner and the DTI*². According to the Tribunal, LPP is '*a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as the exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.*'
18. In describing the rationale for LPP, the Tribunal also recognised the two categories of LPP: legal advice privilege and litigation privilege. Litigation privilege applies when litigation is underway or anticipated. Legal advice privilege may apply whether or not there is any litigation in prospect. It will only cover confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice.
19. The public authority submitted that the information in the pamphlet fell within the category of legal advice privilege.

² EA/2005/0023 – paragraph 9

20. The public authority explained that the pamphlet was prepared by an internal lawyer for the benefit of other members of the office. It noted that the Tribunal had recognised that the scope of LPP is not limited to communications with external or independent lawyers.³ The public authority submitted that the pamphlet contained legal advice for drafters in the Office of the Parliamentary Counsel (OPC) and referred to legal advice provided by lawyers in the OPC to clients in other government departments in particular cases.
21. The public authority explained that much of the information in the pamphlet draws on confidential communications with officials in the Public Bill Offices in the House of Commons and the House of Lords as well as confidential communications between OPC lawyers and their clients. It pointed out that in the case of *Three Rivers District Council and others v Governor and Company of the Bank of England*⁴, Lord Scott agreed that legal advice privilege applies to the advice given by Parliamentary Counsel to the government in relation to the drafting and preparation of public bills.
22. The Commissioner agrees with the public authority that scope of LPP is not limited to communications with external or independent lawyers. He does not disagree that the principles which underpin LPP could apply to advice given by Parliamentary Counsel to the government pursuant to the drafting and preparation of public bills.
23. However, in the Commissioner's view, whether or not legal advice privilege applies to information is a question of fact which requires a careful consideration of the relevant information in context. The advice must concern legal rights, liabilities, obligations or remedies or otherwise have a relevant legal context. Advice from a lawyer on a purely financial, operational, public relations or strategic business issue is unlikely to be privileged, unless the advice was obtained within a legal context – for example, in the context of possible legal remedies on an unfavourable outcome.
24. The information in the pamphlet served (before it was revised) as a guide for drafters primarily to assist them to identify and bring to the attention of the House authorities⁵ any part of a bill which might require the Queen's or Prince's consent before it is passed into law.

³ Calland v Information Commissioner and the Financial Services Authority, EA/2007/0136

⁴ [2004] UKHL 48, paragraph 41

⁵ Houses of Parliament

25. The Commissioner considers the information within the scope of the request of 24 August constitutes advice on a primarily operational matter. It does not appear to have been produced for the dominant purpose of providing legal advice. The information clearly refers to existing legal obligations, procedural requirements and historical practices. However, the Commissioner does not consider that it was provided in a strictly legal advice-giving context. The primary motivation (and this is reflected in the nature of the information itself) was to provide drafters with indicators to assist them in determining whether any part of a bill might require the consent of The Duchy of Cornwall and should therefore be brought to the attention of the House authorities.
26. For the these reasons, the Commissioner finds that the information within the scope of the request of 24 August is not exempt from disclosure on the basis of section 42(1) of the Act.
27. In view of his finding that the exemption was not engaged, the Commissioner is not required to conduct the public interest test.

27 September 2011

28. The public authority withheld the information in the pamphlet dated 1 August 2008 on the basis of section 42(1) for the same reasons it withheld the information within the scope of the request of 24 August.
29. The Commissioner finds that the pamphlet of 1 August 2008 was not exempt from disclosure on the basis of section 42(1) of the Act for the same reasons he found section 42(1) did not apply to the information within the scope of the request of 24 August.
30. In view of this decision, it was again not necessary for the Commissioner to conduct the public interest test.

Right of appeal

31. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF